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COMMENT

INDIAN COUNTRY AFTER ANCSA: DIVESTING TRIBAL SOVEREIGNTY BY INTERPRETATION IN *ALASKA V. NATIVE VILLAGE OF VENETIE TRIBAL GOVERNMENT*

INTRODUCTION

The Alaska Native tribe of Venetie Indians has inhabited an area in north-central Alaska¹ since before the United States Supreme Court was even a sparkle in our forefathers' eyes. Yet the recent Supreme Court decision in *Alaska v. Native Village of Venetie Tribal Government*,² arguably stripped the Venetie Indians of the inherent sovereignty and tribal identity they have held since time immemorial. Ignoring widely accepted canons of statutory construction intended to help Native American people maintain their history and existence,³ the Court took a significant step toward assimilating all Native Americans into our national melting pot and effectively terminating the only living history that remains in our country today.

This Comment contends that the *Venetie* Court's interpretation of 18 U.S.C. § 1151(b)⁴ was erroneous and unjust. Through its finding that the Venetie tribe did not inhabit Indian country because it was not a dependent Indian community,⁵ the Court perpetuated the federal government's tradition of systematically chipping away at the Indians' inherent sovereignty.⁶ This decision potentially denies not only the Venetie tribe, but

1. Nearly all inhabitants of the Native village of Venetie descend from the Neets'ait Gwich'in, a group of Alaska Natives living near the East Fork of the Chandalar River since before recorded history. See *Alaska ex rel. Yukon Flats School Dist. v. Native Village of Venetie Tribal Gov't*, 101 F.3d 1286, 1289 (9th Cir. 1996), *rev'd* *Alaska v. Native Village of Venetie Tribal Gov't*, 118 S. Ct. 948 (1998).

2. 118 S. Ct. 948, 955-56 (1998).

3. See, e.g., *Tulee v. Washington*, 315 U.S. 681, 684-85 (1942) (stating that courts should read all federal action as protecting Indian rights and in a manner favorable to Indians); *Alaska Pacific Fisheries Co. v. United States*, 248 U.S. 78, 89 (1918) (stating that statutes affecting Indian rights "are to be liberally construed, doubtful expressions being resolved in favor of the Indians"). Among these canons is the rule that Congress's intent to abrogate Indian rights must be indicated by a "clear and plain" statement. FELIX S. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* 224, (Rennard Strickland et al. eds., 1982) (quoting *United States v. Santa Fe Pac. R.R. Co.*, 314 U.S. 339, 353 (1941)).

4. 18 U.S.C. § 1151(b) (1994) provides that a dependent Indian community constitutes Indian country. Although this is a criminal statute, the definition provided applies to both criminal and civil jurisdiction. *Venetie*, 101 F.3d at 1291.

5. *Venetie*, 118 S. Ct. at 955-56.

6. Those powers lawfully vested in an Indian tribe are not delegated powers granted by express acts of Congress, but rather inherent powers of a limited sovereignty which has never been extinguished. COHEN, *supra* note 3, at 232. Prior to European settlement of North America, the Indians governed themselves free of outside control. *Id.* As colonization progressed, the United States recognized the Indian tribes as sovereigns and negotiated agreements to occupy the land. *Id.*

Native Americans nationwide⁷ of the rights and sovereign powers they have held for hundreds of years. This decision arguably ignores the intent of Congress⁸ in creating the Alaska Native Claims Settlement Act (ANCSA)⁹ and is unjust in its effect.

Part I details the life of the term "Indian country" from its birth in the mid-eighteenth century to its debatable death¹⁰ in Alaska on February 25, 1998. Part II then describes the specific events leading up to the Supreme Court's decision in *Venetie*. This historical path will provide an understanding of the unique relational status between Native Alaska tribes and the federal government over the past two hundred years. Part III explores these relationships further, focusing on the methods by which the Venetie Indian's tribal sovereignty and identity have been stripped away. In Part III, the Court's disregard of widely accepted canons of statutory construction is discussed, along with some of the future implications of the *Venetie* decision. Finally, Part III describes the dichotomy created by the Court's interpretation of section 1151, wherein the Indians' ability to maintain their sovereignty is dependent upon the government maintaining a high level of superintendence. This intriguing contradiction is discussed, as it continues a tradition of governmental inconsistency throughout history with respect to Indian tribes.

This sovereignty has eroded over time as the government has limited Indian rights and powers. *See, e.g.*, 25 U.S.C. § 177 (1994) (prohibiting the distribution of tribal property without the consent of the United States); 25 U.S.C. §§ 564, 691 (1994) (terminating the federal-tribal relationship with some tribes and subjecting others to varying degrees of state authority); General Allotment Act, 25 U.S.C. §§ 331-334, 339, 341, 342, 348, 349, 354, 381 (1994) (providing for allotments to individual Indians thereby diminishing tribal control over Indian land); The Major Crimes Act, 18 U.S.C. § 1153 (1994) (extending federal criminal jurisdiction over Indians in Indian country); Indian Civil Rights Act, 25 U.S.C. §§ 1301-1341 (1994) (subjecting tribal authority to administrative and limited judicial review). While this erosion of tribal sovereignty has continued, some statutes restricting tribal authority and sovereignty have been repealed. *See, e.g.*, 25 U.S.C. §§ 1304-1310, 1313-1320, 1327-1330, 1332-1340.

7. While the *Venetie* decision only directly affects the Venetie Tribe, it potentially may have a secondary effect on the entire Native American community. *Cf. infra* note 189 (providing a historical examination of the federal government's treatment of Native American tribes).

8. The legislative history of the Alaska Native Claims Settlement Act states:

Under the committee bill all reservations in Alaska are revoked, unless the village corporations located within the reservation elect to take fee title to the reservation. If Natives do elect to take title to the reservation, they will not participate in the land selection procedures of the bill, nor share in the monetary settlement.

117 CONG. REC. 46,967 (1971). This statement indicates Congress's intent that reservation status be retained by tribes choosing this option, as did the Venetie tribe. By retaining such status, the land remains "Indian country." *Id.*

9. 43 U.S.C. §§ 1601-1629e (1994).

10. While the effect of this decision on native sovereignty resounds nationwide, the purported "death" of Indian country refers those areas within Alaska. The decision acknowledges only one reservation in the state which still falls under the Indian country category. *Venetie*, 118 S. Ct. at 955-56.

I. BACKGROUND

A. *The Origin of "Indian Country"*

The term "Indian country," first officially employed in King George's Royal Proclamation of 1763,¹¹ established a boundary line separating the lands of the Indians from those of the colonists.¹² After the Revolutionary War, Congress initially used the term in passing the Indian Intercourse Act of 1796.¹³ This law contained the first statutory definition of Indian Country, tracing a line of boundaries throughout the continental United States. The Indian Intercourse Act of 1834 further defined "Indian country" as "all that part of the United States west of the Mississippi."¹⁴ In 1872 Congress specifically extended the definition to encompass all of the mainland, islands and waters of Alaska following a district court's finding that the term "Indian country" did not encompass Alaska.¹⁵ Soon after, the portion of the 1834 Act defining Indian country was repealed,¹⁶ leaving the determination of what comprised Indian country to the courts.¹⁷ Almost a century later, Congress expressly redefined "Indian country" through its enactment of section 1151 as:

11. See COHEN, *supra* note 3, at 57 n.60 (describing the Royal Proclamation of Oct. 7, 1763, of King George); see also *State ex rel. Yukon Flats School Dist. v. Native Village of Venetie Tribal Gov't*, No. F87-0051 CV, 1995 WL 462232, at *2 (D. Alaska Aug. 2, 1995).

12. *Venetie*, 1995 WL 462232, at *2. The British temporarily drew a line along the Appalachian mountain range, proclaiming "[e]verything to the west of the mountains and east of the Mississippi [to be] Indian Country." *Id.* At the time, the land west of the Mississippi was claimed by France or Spain. *Id.* The British attempted to establish a detailed boundary line which continued to move westward as the Indians were compelled to sacrifice more land through purchases and treaties. *Id.*

13. The Act of May 19, 1796, ch. 30, 1 Stat. 469, was the "third in the series of trade and intercourse Acts" and the first to include a detailed definition of Indian country. COHEN, *supra* note 3, at 112.

14. Act of June 30, 1834, ch. 161, § 1, 4 Stat. 729, 729 (1834).

15. Act of Mar. 3, 1873, ch. 227, 17 Stat. 510, 530 (1873). In *United States v. Seveloff*, 27 F. Cas. 1021 (D. Or. 1872), the court held that Indian country was only that portion of the United States or its territories which had been declared to be such by an act of Congress and land was not Indian country just because it was inhabited or owned by Indians. *Seveloff*, 27 F. Cas. at 1022. The Indian Intercourse Act of 1834, along with the subsequent revision in 1868, was originally developed as a provision for liquor control. *Id.* at 1024.

16. Act of June 30, 1834, ch. 161, § 17, 4 Stat. 729, 731 (repealed, in part, 1859) (codified as amended at 25 U.S.C. § 229 (1994)). In 1851, the federal government discontinued "removing" tribes westward and began to locate Indians on tribal reservations within organized territories and states, allotting reservation land to individual tribe members. COHEN, *supra* note 3, at 31. In 1874, after these actions had all but rendered the 1834 definition of "Indian country" obsolete, the compilers of the Revised Statutes omitted the definition altogether, effectively repealing it. *Id.* Despite the obsolescence of the 1834 statute's definition of Indian country, an entire chapter of the new federal laws was titled "Government of Indian Country." *Id.* "Without a statutory definition, the determination of what comprised Indian country was necessarily left to the courts." *Id.*

17. See *United States v. McGowan*, 302 U.S. 535, 536-39 (1938); *United States v. Pelican*, 232 U.S. 442, 449 (1914); *United States v. Sandoval*, 231 U.S. 28, 37 (1913); *Donnelly v. United States*, 228 U.S. 243, 268-69 (1913); *Ex parte Crow Dog*, 109 U.S. 556, 561 (1883); *Bates v. Clark*, 95 U.S. 204, 206-08 (1877). Drawing on the definition from the Indian Intercourse Act of 1834, the *Bates* Court concluded that Indian lands were Indian country as long as the Indians had title to it, but when they parted with title, it ceased to be Indian country. *Bates*, 95 U.S. at 208-09. This definition

(a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, . . . (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, . . . and (c) all Indian allotments, the Indian titles to which have not been extinguished.¹⁸

Four United States Supreme Court cases played a primary role in establishing the basis of the section 1151 definition of Indian country.¹⁹

1. *Donnelly v. United States*²⁰

In *Donnelly v. United States*, a non-Indian convicted of murdering an Indian within the limits of the Hoopa Valley Indian reservation in California appealed his conviction.²¹ The *Donnelly* Court addressed the issue of whether the killing of an Indian by a non-Indian, when committed on an Indian reservation, fell under the jurisdiction of the federal courts.²² The defendant alleged the federal court, in hearing the case, improperly infringed on the state's jurisdiction. Knowing that federal courts have jurisdiction over Indian country, the defendant contended that the term "Indian country" was confined to those lands the Indians retain through their original right of possession, and therefore did not apply to those set apart as Indian reservations out of the public domain.²³ The Court concluded that "nothing can more appropriately be deemed 'Indian country' . . . than a tract of land that . . . is lawfully set apart as an Indian reservation."²⁴ Section 1151(a) codifies *Donnelly*, providing that all land within the limits of an Indian reservation is Indian country.²⁵

2. *United States v. Sandoval*²⁶ and *United States v. McGowan*²⁷

Subsection (b) of section 1151, codifies the "dependent Indian communities" test as first established in *United States v. Sandoval*.²⁸ In *Sandoval*, the Court held the federal government has the power to enact

was expanded to include reservation lands to which Indian title had not been extinguished in *Ex parte Crow Dog*, 109 U.S. at 561. In *Donnelly*, the Court specified that land must be "set apart" by the government for Indians in order to be Indian country. *Donnelly*, 228 U.S. at 269.

18. 18 U.S.C. § 1151 (1994).

19. 18 U.S.C. § 1151 note (Historical and Revision Notes—1948 Act) (explaining that subsection (a) regarding reservation lands is a codification of *Donnelly*, subsection (b) is a codification of the "dependent Indian community" concept as developed in *McGowan* and *Sandoval*, and subsection (c) is the codification of the holding of *Pelican* regarding allotments).

20. 228 U.S. 243 (1913).

21. *Donnelly*, 228 U.S. at 252.

22. *Id.* at 255.

23. *Id.* at 268.

24. *Id.* at 269.

25. 18 U.S.C. § 1151 (1994).

26. 231 U.S. 28 (1913).

27. 302 U.S. 535 (1938).

28. *Sandoval*, 231 U.S. at 45-46.

laws for the benefit and protection of all dependent Indian communities within the United States.²⁹ At issue in *Sandoval* was whether Congress held jurisdiction to protect the Pueblo Indians by prohibiting the introduction of liquor into Pueblo lands. The Court concluded that such protection is extended by the United States "over all dependent Indian communities within its borders."³⁰

In *United States v. McGowan*, the Court relied on *Sandoval* to support its holding that a dependent Indian community is Indian country and that Indian country exists wherever two factors are met: Indian country is land that has been (1) "set apart for the use of the Indians as such"³¹ and remains (2) "under the superintendence of the [federal g]overnment."³² Again at issue was Congress's power to protect the Indians from the introduction of liquor on the Indian lands. The Court recognized that the Reno Indian Colony was composed of several hundred Indians residing on a tract of land owned by the United States, created for the purpose of providing land for Indians scattered throughout Nevada.³³ Applying *Sandoval*, the Court found the Reno Colony had been validly set apart for the use of the Indians and was under the superintendence of the federal government; therefore, the government had authority to enact regulations and protective laws respecting such territory.³⁴

3. *United States v. Pelican*³⁵

The third classification of Indian country is described in section 1151(c) as all Indian allotments,³⁶ those Indian titles which have not been extinguished. In *United States v. Pelican*, the defendants were charged with a crime occurring upon an Indian allotment.³⁷ The defendants ob-

29. *Id.*

30. *Id.* at 46.

31. *Id.* at 539 (emphasis omitted). The intended meaning of this phrase is that the land be set apart to be utilized by the Indians for Indian purposes. See *Alaska v. Native Village of Venetie Tribal Government*, 118 S. Ct. 948, 954-55 (1998).

32. *McGowan*, 302 U.S. at 539 (quoting *United States v. Pelican*, 232 U.S. 442, 449 (1914)) (emphasis omitted).

33. *Id.* at 537.

34. *Id.* at 539.

35. 232 U.S. 442 (1914).

36. See Act of July 1, 1892, ch. 140, 27 Stat. 62 (creating the allotment at issue in *Pelican*). This idea of "allotting" land debuted in 1887 when Congress passed the General Allotment Act. General Allotment (Dawes) Act, ch. 119, 24 Stat. 388 (1887) (codified as amended at 25 U.S.C. §§ 331-358 (1994)) (providing each Indian with a parcel of land in an attempt to break up tribes and assimilate the Indians into white society by forcing them to acquire private land). The act was a catastrophe from the perspective of both the Indian and the white man. STEPHEN L. PEVAR, *THE RIGHTS OF INDIANS AND TRIBES: THE BASIC ACLU GUIDE TO INDIAN AND TRIBAL RIGHTS* 5 (2d ed. 1992). The Indians did not want to own land individually because they preferred to own land as a tribal unit. *Id.* The white man thought the Indians would emulate the non-Indians who lived among them thereby becoming more productive ranchers and farmers. *Id.* Instead the Indians fell deeper into poverty because they were unable to maintain their previous manner of subsistence. *Id.*

37. The term "Indian allotment" refers to "land owned by individual Indians and either held in trust by the United States or subject to statutory restriction on alienation." COHEN, *supra* note 3, at

jected to federal jurisdiction arguing that the crime was not committed within Indian country.³⁸ Since the specific allotted lands in this case were to be held in trust by the United States for twenty-five years from the date of allotment for the sole use and benefit of the allottee,³⁹ the Court concluded that the lands continued to be under the jurisdiction and control of Congress.⁴⁰ Such allotted lands, therefore, remain Indian country until the allotment expires.

The concept of Indian country as the dependent Indian community has continued to develop in the courts,⁴¹ focusing on the question of whether land has been validly set apart for Indians, under government superintendence.⁴² Still, today it is these two characteristics which must exist in order for a court to recognize a dependent Indian community as Indian country.⁴³

B. *Post ANCSA Indian Country*

Prior to 1971, the Venetie Indian Tribe clearly subsisted subject to active superintendence by the government to such a degree as to amount to a dependent Indian community for the purposes of section 1151(b).⁴⁴ However, with the enactment of the Alaska Native Claims Settlement Act (ANCSA)⁴⁵ in 1971, Alaska Natives obtained ownership of approximately forty-four million acres of public land through corporations established by the Act. In exchange, the government extinguished all Native land claims.⁴⁶ As part of the ANCSA reorganization, Congress also revoked all but one reservation in Alaska and included a special provi-

40. "Most allotments were originally carved out of tribal lands held in common." *Id.* Since 1875, however, a number of statutes have allowed Indians to obtain allotments out of the public domain. *Id.* The General Allotment Act provided that title to land allotted to Indians would be held in trust by the United States for twenty-five years. *See supra* text accompanying note 36. The 1906 amendments to the Act authorized the President to extend the trust period on any allotment indefinitely. Act of June 21, 1906, ch. 3504, 34 Stat. 325, 326 (codified as amended at 25 U.S.C. § 391 (1994)).

38. *Pelican*, 232 U.S. at 444.

39. Act of July 1, 1892, ch. 140, § 4, 27 Stat. 62, 63 (noting the provisions of the Dawes Act, ch. 119, 24 Stat. 388 (1887)).

40. *Pelican*, 232 U.S. at 447.

41. *See* *United States v. South Dakota*, 665 F.2d 837, 839-43 (8th Cir. 1981); *United States v. Martine*, 442 F.2d 1022, 1023-24 (10th Cir. 1971).

42. *State ex rel. Yukon Flats School Dist. v. Native Village of Venetie Tribal Gov't*, No. F87-0051 CV, 1995 WL 462232, at *6 (D. Alaska Aug. 2, 1995).

43. *See* *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 511 (1991) (concluding that the question of whether land constitutes Indian country turns on whether the area was validly set apart for the use of the Indians, under the superintendence of the government).

44. *Venetie*, 1995 WL 462232, at *15.

45. 43 U.S.C. §§ 1601-1629e (1994). ANCSA "was designed to open Alaska quickly to oil drilling and to provide a final determination of Indian land claims in the state, transferring millions of acres of land to native corporations." Max Mizner, Note, *Construction Work: The Canons of Indian Law*, 107 YALE L.J. 863 n.4 (1997).

46. 43 U.S.C. §§ 1603, 1611, 1613. ANCSA created a complex corporate scheme for Native land administration and development in Alaska. It provided for the creation of thirteen Native corporations and conveyed 44 million acres of land. *See* 43 U.S.C. §§ 1606, 1607, 1611, 1613.

sion applicable to the Natives whose reservations were revoked. This provision permitted members or stockholders of village corporations who had previously inhabited a reservation to vote that their corporation take fee title to the former reservation lands.⁴⁷

ANCSA, therefore, clearly and explicitly extinguished aboriginal land title in Alaska,⁴⁸ yet left in its wake a question as to the remaining existence of "Indian country" in the state. As a result of ANCSA, the status of the dependent Indian community became ambiguous and its survival questionable.

II. ALASKA V. NATIVE VILLAGE OF VENETIE TRIBAL GOVERNMENT⁴⁹

A. Facts and Procedural History

Virtually all members of the Native Village of Venetie descended from the Neets'aai Gwich'in, the Native tribe historically inhabiting the area.⁵⁰ In 1940, the Neets'aai Gwich'in adopted a constitution under the Indian Reorganization Act,⁵¹ which established the Native Village of Venetie as the governing authority of the tribe.⁵² In 1943, the Secretary of the Interior formed a reservation for the tribe, comprised of 1.8 million acres of land that surrounded the village.⁵³ In December 1971, ANCSA revoked all but one Alaskan reservation and provided for corporations

47. 43 U.S.C. § 1618(b). This section provided the corporations the right to effectively "trade" their corporate status and excess acreage for the land that comprised their original reservation. *Id.*

48. ANCSA provides:

All claims against the United States, the State, and all other persons that are based on claims of aboriginal right, title, use, or occupancy of land or water areas in Alaska, or that are based on any statute or treaty of the United States relating to Native use and occupancy, or that are based on the laws of any other nation, including any such claims that are pending before any Federal or state court or the Indian Claims Commission, are hereby extinguished.

43 U.S.C. § 1603. Prior to ANCSA, rights of Alaska Natives to their aboriginal lands were unclear. See Marilyn J. Ward Ford, *Indian Country and Inherent Tribal Authority: Will They Survive ANCSA?*, 14 ALASKA L. REV. 443, 445 (1997). The Alaska Statehood Act of 1958, Pub. L. No. 85-508, 72 Stat. 339, amended by Alaska Omnibus Act, Pub. L. No. 86-70, 73 Stat. 141 (1959) (codified as amended at 48 U.S.C. §§ 21-488 (1994)), acknowledged that Alaska Natives had land claims, but did not resolve them. As a result, the Alaska Natives claimed aboriginal title to almost the entire state, filing claims with the Department of the Interior. The Secretary of the Interior "froze" the transfer of title to public land to the State until this issue of native land claims was resolved. *See id.*

49. 118 S. Ct. 948 (1998).

50. *Alaska ex rel. Yukon Flats School Dist. v. Native Village of Venetie Tribal Gov't*, 101 F.3d 1286, 1289 (1996).

51. Indian Reorganization Act of 1934, Pub. L. No. 73-383, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 461-479 (1994)). *See Venetie*, 101 F.3d at 1289. The Indian Reorganization Act enabled all then existing Indian tribes to organize and adopt a constitution. 25 U.S.C. § 476(a) (1994).

52. *Venetie*, 101 F.3d at 1289.

53. *Id.*

comprised entirely of Native shareholders.⁵⁴ ANCSA recognized two Native villages within the boundaries of the former Venetie Reservation and established two Native village corporations for the Neets'aii Gwich'in: the Venetie Indian Corporation and the Neets'aii Corporation.⁵⁵ Two years later, the shareholders of the Venetie and Neets'aii corporations exercised their right, pursuant to ANCSA, to take fee simple title to the former Venetie reservation.⁵⁶ In 1979, the tribal membership, acting through the two corporations, transferred the former Venetie Reservation land title to Venetie.⁵⁷ The shareholders then voted to dissolve the two corporations.⁵⁸

In 1986, Venetie enacted a Business Activities Tax, imposing a tax on gains derived from commercial activities within the village.⁵⁹ Shortly thereafter, the state of Alaska contracted with a construction company to build a new school within the boundaries of the Venetie Village.⁶⁰ Venetie proceeded to impose the new tax and assess it against the construction company.⁶¹ Alaska, the party responsible for payment of the tax, refused to pay and the Village brought an action for collection in tribal court.⁶²

Rather than answer the complaint in the tribal court, the state of Alaska filed a claim in federal court seeking declaratory and injunctive relief against the Native Village.⁶³ Alaska claimed that Venetie had no jurisdiction to impose a tax on nonmembers because (a) it was not an Indian tribe empowered to exercise tribal sovereignty and (b) it did not exist on an Indian reservation.⁶⁴ The district court issued an order enjoining the tribe's enforcement proceedings and Venetie appealed.⁶⁵

The Ninth Circuit Court of Appeals affirmed the district court's preliminary injunction ruling.⁶⁶ The appellate court concluded the tribe's authorization to impose such a tax hinged on two factors: (1) whether it

54. *Id.* "Notwithstanding any other provision of law, and except where inconsistent with the provisions of this [Act], the various reserves . . . are hereby revoked subject to any valid existing rights of non-Natives." 43 U.S.C. § 1618(a) (1994).

55. *Venetie*, 101 F.3d at 1290.

56. *Id.* The United States conveyed the former Venetie Reservation land title to the Venetie Indian Corporation and the Neets'aii Corporation as tenants in common. *Id.*

57. *Id.*

58. *Id.* In 1981, the state of Alaska proceeded to officially dissolve the corporations for non-payment of incorporation fees. *Id.*

59. *Id.* The power to tax is an inherent authority in any government and is therefore an aspect of the retained sovereignty of Indian tribes except where it has been limited or withdrawn by federal authority. COHEN, *supra* note 3, at 431.

60. *Venetie*, 101 F.3d at 1290.

61. *Id.*

62. *Id.*

63. *See Alaska ex rel. Yukon Flats School Dist. v. Native Village of Venetie*, 856 F.2d 1384, 1386 (9th Cir. 1988).

64. *Venetie*, 856 F.2d at 1386.

65. *Id.*

66. *Id.* at 1391.

was a federally recognized tribe, and (2) whether it inhabited "Indian country."⁶⁷ The case was remanded back to the district court to resolve these issues.⁶⁸

The United States District Court for the State of Alaska found the lands of the Venetie tribe were neither set aside for Alaska Natives, nor under the superintendence of the federal government. Therefore the Venetie Indians, although a tribe, were not a dependent Indian community for purposes of section 1151(b).⁶⁹ Based on these findings, the court concluded the lands of the Venetie Indians did not constitute Indian country, rendering the tribe without authority to impose a tax upon nonmembers.⁷⁰

The district court opinion stated, however, that the tribe did constitute a dependent Indian community prior to the enactment of ANCSA.⁷¹ The court determined that ANCSA significantly diminished the federal government's power by prohibiting the government from exercising the level of superintendence necessary to be the dominant political institution in the area, to the exclusion of the state.⁷² Implicit in this opinion lies the court's unsupported assumption that a dependent Indian community requires total superintendence by the federal government and leaves no jurisdictional powers to the state. The Venetie tribe appealed, arguing that the district court applied an unduly restrictive standard⁷³ to determine whether their land was Indian country, that ANCSA did not extinguish Indian country in Alaska, and that the Venetie tribe continues to occupy Indian country.⁷⁴ The tribe asserted that based on these three factors, they retained the inherent authority to tax activities within their territory.⁷⁵

The Ninth Circuit Court of Appeals reversed the decision of the district court, holding that while a dependent Indian community requires a showing of federal set aside and federal superintendence, these requirements are to be broadly construed under a multifactored test.⁷⁶ Ap-

67. *Id.* at 1390.

68. *Id.* at 1391.

69. *State ex rel. Yukon Flats School Dist. v. Native Village of Venetie Tribal Gov't*, No. F87-0051, 1995 WL 462232, at *20 (D. Alaska Aug. 2, 1995).

70. *Id.* at *20.

71. *Id.* at *15.

72. *Id.* at *19.

73. The Venetie tribe argued for the application of a broad set of factors such as those set forth in *United States v. Martine*, 442 F.2d 1022, 1023-24 (10th Cir. 1971), and *United States v. South Dakota*, 665 F.2d 837, 839-43 (8th Cir. 1981). See *infra* notes 81-88 and accompanying text. The district court, however, determined that the essential factors to be considered when assessing the existence of a dependent Indian community were whether the Tribal Government holds land set apart for the Indians and whether the Tribal Government is under the active supervision of the federal government. See *Alaska ex rel. Yukon Flats School Dist. v. Native Village of Venetie Tribal Gov't*, 101 F.3d 1286, 1292 (9th Cir. 1996). The Supreme Court ultimately applied this variation of the test. See *Alaska v. Native Village of Venetie Tribal Gov't*, 118 S. Ct. 948, 953 (1998); see also *infra* notes 94-113 and accompanying text.

74. *Venetie*, 101 F.3d at 1290.

75. *Id.*

76. *Id.* at 1302.

plying the test set forth below, the court concluded that ANCSA did not extinguish Indian country in Alaska and that the Venetie village constituted a dependent Indian community whose territory satisfied the definitional test for Indian country.⁷⁷

While agreeing with the district court that federal set aside and federal superintendence are the *dominant* elements of the dependent Indian community analysis, the Ninth Circuit evaluated the following factors as a means of broadly construing those requirements:

(1) the nature of the area; (2) the relationship of the area inhabitants to Indian tribes and the federal government; (3) the established practice of government agencies toward that area; (4) the degree of federal ownership of and control over the area; (5) the degree of cohesiveness of the area inhabitants; and (6) the extent to which the area was set aside for the use, occupancy, and protection of dependent Indian peoples.⁷⁸

In formulating these factors, the Ninth Circuit relied heavily on two circuit court decisions which played a leading role in shaping the law regarding dependent Indian communities subsequent to the enactment of section 1151.⁷⁹ Each of these cases set out a multifactored analysis of its own to determine the Indian country issue.⁸⁰

1. *United States v. Martine*⁸¹

The defendant, Martine, was a Navajo Indian charged with involuntary manslaughter in an auto accident which occurred on land owned by the Navajo Tribe.⁸² In deciding that the land in question was Indian country, the trial court considered the following three factors: "[1] the nature of the area in question, [2] the relationship of the inhabitants of the area to Indian Tribes and to the federal government, and [3] the established practice of government agencies toward the area."⁸³ The Tenth Circuit concluded that this was the proper approach and upheld the trial court's decision.⁸⁴

2. *United States v. South Dakota*⁸⁵

The state of South Dakota appealed a district court decision declaring a housing project located in the city of Sisseton, South Dakota, to be

77. *Id.* at 1293.

78. *Id.* at 1294.

79. *State ex rel. Yukon Flats School Dist. v. Native Village of Venetie Tribal Gov't*, No. F87-0051 CV, 1995 WL 462232, at *6 (D. Alaska Aug. 2, 1995).

80. *Id.*

81. 442 F.2d 1022 (10th Cir. 1971).

82. *Martine*, 442 F.2d at 1022.

83. *Id.* at 1023.

84. *Id.*

85. 665 F.2d 837 (8th Cir. 1981).

a "dependent Indian community."⁸⁶ Relying on *Martine*, the Eighth Circuit in *South Dakota* considered four factors: (1) whether the United States retained title to the lands and authority to enact regulations respecting the territory; (2) the nature of the area and the relationship of the inhabitants of the area to Indian tribes and to the federal government and the established practice of the government towards the area; (3) whether there was an element of cohesiveness among the people; and (4) whether such lands were set apart for the use and occupancy and protection of dependent Indian peoples.⁸⁷ The Eighth Circuit concluded that the land, held by the United States in trust for the Sioux Tribe, was a dependent Indian community within the meaning of section 1151(b).⁸⁸

Based on an evaluation of its six factor test drawn from *Martine* and *South Dakota*, the Ninth Circuit in *Venetie* found that ANCSA did not extinguish Indian country, and that it *specifically* conferred the land at issue to the Venetie Natives, clearly satisfying the set aside requirement for a dependent Indian community.⁸⁹ In addition, the Ninth Circuit categorically disagreed with the district court's analysis of federal superintendence and its notion that federal supervision must be dominant to satisfy this prong of the test.⁹⁰ The court stated that the test of federal superintendence focuses on whether the federal government has abandoned its trust responsibilities,⁹¹ rather than whether the state government has been involved in tribal affairs.⁹² The Ninth Circuit then concluded ANCSA did not terminate the trust relationship between the federal government and the Venetie tribe and therefore the federal superintendence prong of the test was satisfied.⁹³

B. Supreme Court Decision

The unanimous opinion, written by Justice Clarence Thomas, held the term "dependent Indian communities" refers to a limited category of Indian lands that are neither reservations nor allotments,⁹⁴ and that satisfy two requirements—first, they must have been set aside by the federal government for the use of the Indians as Indian land; second, they must be under federal superintendence.⁹⁵ The Court concluded the Venetie

86. *South Dakota*, 665 F.2d at 838.

87. *Id.* at 839.

88. *Id.* at 838–41.

89. *Alaska ex rel. Yukon Flats School Dist. v. Native Village of Venetie Tribal Gov't*, 101 F.3d 1286, 1296 (9th Cir. 1996).

90. *Venetie*, 101 F.3d at 1297.

91. The trust responsibility requires the government to act in the best interests of the Indians in every aspect of Indian life. PEVAR, *supra* note 36, at 26.

92. The trust responsibility may be vacated only by an express act of Congress. *Id.* at 30.

93. *Venetie*, 101 F.3d at 1297.

94. *Alaska v. Native Village of Venetie Tribal Gov't*, 118 S. Ct. 948, 951 (1998); *see* 18 U.S.C. § 1151(c).

95. *Venetie*, 118 S. Ct. at 953.

Tribe's lands did not satisfy either of these requirements and therefore were not Indian country.⁹⁶

The Court reasoned that by enacting section 1151(b), Congress codified the federal set aside and superintendence requirements which the Court had previously held necessary for a finding of "Indian country" generally.⁹⁷ The Court referred to its previous holdings in *Sandoval*,⁹⁸ *Pelican*,⁹⁹ and *McGowan*,¹⁰⁰ indicating Indian lands that were not reservations could still constitute Indian country, and the federal government could therefore exercise jurisdiction over such lands.¹⁰¹

In all of these cases, the Court relied upon a finding of both a federal set aside and federal superintendence to conclude that the Indian lands in question constituted Indian country. In addition, the Historical and Revision Notes to section 1151 declare that its definition is based on the *Sandoval*, *Pelican*, and *McGowan* holdings.¹⁰² With those two points in mind, the Court chose to ignore the standards set forth by the Ninth Circuit, drawn from *Martine* and *South Dakota*, determining that Congress intended only that the federal set aside and superintendence requirements be satisfied prior to the finding of a dependent Indian community.¹⁰³

Based on these findings, the Court concluded that as a result of ANCSA, the Venetie Tribal lands were not validly set aside for the use of the Indians, nor were they under the superintendence of the federal government.¹⁰⁴ The Court opined that ANCSA's revocation of the existing Venetie reservation, and all reservations in Alaska set aside by legislation or Executive or Secretarial Order for Native use,¹⁰⁵ manifested a clear departure from Congress's traditional practice of setting aside Indian lands.¹⁰⁶ Rejecting the Tribe's argument that the ANCSA lands were specifically set aside, the Court cited the portion of ANCSA stating that lands are transferred "without any restraints on alienation or significant use restrictions, and with the goal of avoiding 'any permanent racially defined institutions, rights, privileges, or obligations.'"¹⁰⁷ The Court con-

96. *Id.* at 955.

97. *Id.* at 953.

98. 231 U.S. 28, 46 (1913).

99. 232 U.S. 442, 449 (1914).

100. 302 U.S. 535, 537 (1938).

101. *Venetie*, 118 S. Ct. at 953.

102. See 18 U.S.C. § 1151 note (1994) (Historical and Revision Notes—1948 Act) (explaining that subsection (a) regarding reservation lands is a codification of *Donnelly*, subsection (b) is a codification of the "dependent Indian community" concept as developed in *McGowan* and *Sandoval*, and subsection (c) is the codification of the holding of *Pelican* regarding allotments).

103. *Venetie*, 118 S. Ct. at 954.

104. *Id.* at 955.

105. 43 U.S.C. § 1618(a) (1994). The Alaskan Annette Island Reservation was expressly exempted from revocation by ANCSA. *Id.*

106. *Venetie*, 118 S. Ct. at 955.

107. *Id.* (quoting 43 U.S.C. § 1601(b) (1994)).

cluded that because Congress contemplated that non-Natives could own the former Venetie Reservation, and because the Tribe was free to use it for non-Indian purposes,¹⁰⁸ the federal set-aside requirement was not met.¹⁰⁹

The Court also concluded that ANCSA ended federal superintendence over the Tribe's lands.¹¹⁰ Citing Congress's intention that ANCSA's settlement provisions work to avoid a "lengthy wardship or trusteeship,"¹¹¹ the Court decided that any remaining federal protection of the Tribe's land is quite limited and does not approach the level of superintendence necessary to meet the requirement as intended by Congress.¹¹² Conceding that ANCSA's attempt to instill self-determination undercuts the federal superintendence requirement, the Court stated that any modification of the concept of Indian country is a question entirely for Congress.¹¹³

III. ANALYSIS

Hopefully Congress will heed the Court's call, as it did when its first "Indian country" definition was misinterpreted in 1873.¹¹⁴ Throughout history, both Congress and the executive branch have been inconsistent in their maintenance of the federal government's unique relationship with, and responsibility to, Indian tribes and to the Indian people as a whole. While ANCSA supports Native autonomy and disavows any lengthy wardship and trusteeship, an understanding of the origin of the unique relationship between the Native Americans and the federal government reconciles the seemingly contradictory status the Venetie Indians seek.

The Supreme Court began to recognize the existence of a trust relationship between the federal government and Indian people in *Cherokee Nation v. Georgia*,¹¹⁵ and *Worcester v. Georgia*,¹¹⁶ two decisions interpreting Indian treaties. Between 1787 and 1871 the government entered into hundreds of treaties with Indian tribes in which the Indians gave up

108. The tribe used the land exclusively for Indian purposes. Under the original statute, ANCSA restricted membership in its corporations exclusively to Natives for 20 years. 43 U.S.C. § 1606(h)(1) (1982) as amended by Alaska Native Claims Settlement Act Amendments of 1987, Pub. L. No. 100-241, 101 Stat. 1788 (codified at 43 U.S.C. § 1629c (1994)). However, the 1987 Amendments allow each corporation to extend this restriction indefinitely. 43 U.S.C. § 1629c(c)(1)(B)(i).

109. *Venetie*, 118 S. Ct. at 955.

110. *Id.*

111. 43 U.S.C. § 1601(b).

112. *Venetie*, 118 S. Ct. at 956.

113. *Id.*

114. Congress revised the definition of "Indian country" to expressly encompass Alaska after the court held otherwise in *Seveloff*. *United States v. Seveloff*, 27 F. Cas. 1021, 1024 (D. Or. 1872). The Indian Intercourse Act of 1834, along with the subsequent revision in 1873, incorporated the revised definition. Act of Mar. 3, 1873, ch. 227, 17 Stat. 510, 530 (1873); see *supra* Part I.A (discussing the early development of "Indian country").

115. 30 U.S. (5 Pet.) 1 (1831).

116. 31 U.S. (6 Pet.) 515 (1832).

their land in return for promises made by the government.¹¹⁷ The Supreme Court has held such promises, including guarantees that the United States would create permanent reservations and protect the safety and well-being of tribal members, create a trust relationship resembling that of a ward to his guardian.¹¹⁸ This "trust responsibility imposes an independent obligation upon the federal government to remain loyal to the Indians and to advance their interests."¹¹⁹ A trust relationship, however, may be terminated without a tribe's consent by an express act of Congress.¹²⁰

In 1970, President Nixon enunciated a federal policy of self-determination toward the Native Americans without termination of the trust relationship.¹²¹ The President denounced terminating the trust relationship because it would ignore the moral and legal obligations between the Native American tribes and the federal government.¹²² In the abstract, President Nixon's statements indicate some historical support for the argument that the federal government is not abandoning its trust relationship when it supports and advocates Indian self-determination.¹²³ Rather the government is working to fulfill these trust responsibilities.¹²⁴ Therefore, ANCSA, a statute enacted only one year later, should be construed with this policy in mind. ANCSA provided the Venetie tribe with methods of enhancing its self determination while maintaining the federal government's trust responsibilities toward the Venetie Indians.

A. Meeting the Requirements for a Dependent Indian Community

1. Federal Set Aside

The Supreme Court, in *Venetie*, determined the Venetie tribal lands did not meet the federal set aside requirement for two reasons. First,

117. PEVAR, *supra* note 36 at 26. From the onset of colonization until the War of 1812, the United States and the Indian tribes negotiated treaties as relative equals. *Worcester*, 31 U.S. at 548-49. The end of the war also brought an end to the threat of British intervention in United States affairs and friendship with the Indians became less valuable. As a result, post-war Indian treaties were usually coerced. For example, in 1835, President Andrew Jackson forced the Cherokees to sign the *Treaty of New Echota*, Dec. 29, 1835, 7 Stat. 478, in which the Cherokees gave up their land east of the Mississippi River in exchange for five million dollars. COHEN, *supra* note 3, at 84. After the signing the treaty, the government compelled the Cherokees to march to Oklahoma, on what came to be known as the "Trail of Tears." COHEN, *supra* note 3, at 92. In 1871, Congress enacted a law prohibiting the making of treaties with Indians, declaring that Indians were not sovereign nations with whom the United States could make treaties. 25 U.S.C. § 71. For a comprehensive discussion of Indian treaties, see COHEN, *supra* note 3, at 62-105.

118. *Cherokee Nation*, 30 U.S. (5 Pet.) at 16.

119. PEVAR, *supra* note 36, at 27.

120. *Id.* at 30.

121. COHEN, *supra* note 3, at 185-86 (citing Special Message to the Congress on Indian Affairs, 1970 PUB. PAPERS 564 (July 8, 1970)).

122. *Id.* at 186.

123. *Id.*

124. *Alaska ex rel. Yukon Flats School Dist. v. Native Village of Venetie Tribal Gov't*, 101 F.3d 1286, 1298 (9th Cir. 1996).

Congress contemplated that non-Natives could own the former Venetie Reservation and second, the Tribe was free to use the land for non-Indian purposes.¹²⁵ In reaching this conclusion the Court dismissed the Tribe's contention that lands acquired pursuant to a specific ANCSA provision were set aside for the use of the Tribe. This provision allowed Natives to take title to former reservation lands in return for forgoing all other ANCSA transfers.¹²⁶ The Congressional Record for ANCSA states:

Under the committee bill all reservations in Alaska are revoked, unless the village corporations located within the reservation elect to take fee title to the reservation. If Natives do elect to take title to the reservation, they will not participate in the land selection procedures of the bill, nor share in the monetary settlement.¹²⁷

It is evident from the language of the record that the legislature intended that village corporations electing to take fee title would retain reservation status. While this legislative commentary should clearly indicate an intent to "set aside" land for the Native tribes who wish to maintain their current tribal land status, the Court disregarded the legislative history.

In addition, the corporations established under ANCSA are different from ordinary business corporations in that only Natives may own stock in the ANCSA corporations. Under the statute, membership in the corporations was originally restricted to Natives for twenty years;¹²⁸ however, this membership may now be extended indefinitely.¹²⁹ The Act also provides for each village corporation to be comprised of Natives from a particular village,¹³⁰ and each village corporation gained estate to the land on which it was already situated.¹³¹ It is impossible to ignore the connection between the Native tribal lands and the method by which they were conveyed under ANCSA, yet this significance was overlooked by the Supreme Court. Congress specifically conferred the land at issue to the Venetie Tribe by statute, and this clearly satisfies the federal set aside requirement.

2. Federal Superintendence

Although the concept of "Indian country" rings of independence, the statutory definition requires the existence of a dependent Indian

125. *Alaska v. Native Village of Venetie Tribal Gov't*, 118 S. Ct. 948, 955 (1998).

126. Brief for Respondent at 40-41, *Alaska v. Native Village of Venetie Tribal Gov't*, 118 S. Ct. 948 (1998) (No. 96-1577) (citing 43 U.S.C. § 1618(b) (1994), in support of their contention that the lands had been set aside specifically for Indian use).

127. *Id.* at 42-43 (quoting 117 CONG. REC. 46,967 (1971)).

128. 43 U.S.C. § 1606(h)(1) (1982).

129. 43 U.S.C. § 1629c(c)(1)(B)(i) (1994).

130. 43 U.S.C. § 1607(a) (1994).

131. 43 U.S.C. § 1611(a)(1) (1994) (conferring on each corporation the right to select all of the township in which any part of the village is located, plus an area that will make the selection equal to the acreage to which the village is entitled).

community.¹³² This dependency standard requires federal superintendence; as a result, the ability of the Indians to maintain their tribal sovereignty remains conditioned on the requirement of federal superintendence. Is it possible for the Indians to truly maintain sovereignty under such circumstances?

The concept of sovereignty with superintendence originated in the Supreme Court opinion of *Johnson v. M'Intosh*.¹³³ The Court held that the United States acquired title to all of the land in North America by discovery and conquest and, in turn, the Indians necessarily lost title to their land.¹³⁴ Although the Indians lost title, they retained a "possessory interest" in all their land unless and until Congress takes that interest away.¹³⁵ With this in mind, even land that is "Indian country" does not truly belong to the Indians. It belongs to the United States government and must remain under the superintendence of the government.

The Supreme Court concluded that in order to meet the federal superintendence requirement, the federal government must actively control the lands in question, effectively acting as a guardian for the Indians.¹³⁶ The Court concluded that after ANCSA, the federal protection of the Tribe's land¹³⁷ did not approach the level of superintendence over the Indians' land that existed in prior cases.¹³⁸ This conclusion is problematic because it assumes the requisite federal superintendence must be over land. The Supreme Court, however, clarified this issue by expressly stating in *United States v. John*¹³⁹ that the "Indians" must be under federal supervision, not the land.¹⁴⁰

The federal government has maintained a course of protective dealings with the Venetie Tribe over the past 130 years.¹⁴¹ The Department of

132. See 18 U.S.C. § 1151 (1994).

133. 21 U.S. (8 Wheat.) 543 (1823).

134. *Johnson*, 21 U.S. (8 Wheat.) at 592.

135. *Id.* A possessory interest recognizes aboriginal title but no ownership right in the land. The land cannot be sold nor is a tribe entitled to compensation when the government "takes" their possessory interest. *Id.* Although the Indians retain no ownership interest in their land, they retain a right of occupancy of their ancestral lands. *Id.* at 574.

136. *Alaska v. Native Village of Venetie Tribal Gov't*, 118 S. Ct. 948, 956 (1998).

137. The Court stated that federal protection was "limited to a statutory declaration that the land is exempt from adverse possession claims, real property taxes, and certain judgments as long as it has not been sold, leased, or developed." *Venetie*, 118 S. Ct. at 956.

138. *Id.*

139. 437 U.S. 634 (1978).

140. *John*, 437 U.S. at 649.

141. Since the purchase of the Alaska Territory in 1967, Alaska Native tribes have been under the same legal regime that applies to all other Native American tribes. See Brief for Respondent at 8, *Alaska v. Native Village of Venetie Tribal Gov't*, 118 S. Ct. 948 (1997) (No. 96-1577). The 1867 Treaty of Cession, subjected the tribes to "such laws and regulations as the United States may, from time to time adopt." Treaty of Cession, Mar. 30, 1867, U.S.-Russ., 15 Stat. 539, 542. As a consequence, courts early on upheld the obligation of the federal government to protect the Natives in-

the Interior continually issued guardianship and protection to the Venetie Tribe, ultimately setting aside a reservation for their protection and benefit in 1943.¹⁴² Since then the government has consistently exercised its trust responsibility to the Venetie Tribe by providing government services and programs, such as allocating federal Indian Health Service monies,¹⁴³ money for housing and development projects, and grants for self-governance projects.¹⁴⁴

The federal government's superintendence role over the Venetie Tribe was not weakened, rather it was preserved by the enactment of ANCSA.¹⁴⁵ ANCSA's measures concerning stock and alienability, voting rights and land protection¹⁴⁶ reflect Congress's intent to maintain that role. ANCSA's provisions preserving the federal government's trust responsibility to provide desperately needed health, social, welfare and economic programs for the Tribe and imposing extensive controls over the activities of the corporations prior to their dissolution¹⁴⁷ underscore the federal government's continuing superintendence over Venetie as well.

In addition, there is no support for the Supreme Court's conclusion that the superintendence of the federal government must be dominant.¹⁴⁸ State supervision over some aspects of Indian life "does not eviscerate Indian country."¹⁴⁹ Despite Congress's delegation of partial jurisdiction to the states over some areas inhabited by Indians, such areas remain Indian country.¹⁵⁰

Finally, since the enactment of ANCSA, Congress does not exclude Alaska Natives from any programs available to other Native Americans, and has specifically included them among those eligible for programs under all new major Indian legislation.¹⁵¹ Such recognition further evidences the federal government's intent to maintain its trust relationship

cluding the ejection of non-Natives encroaching on aboriginal lands. See Respondent's Brief at 8, *Venetie* (No. 96-1577).

142. See Respondent's Brief at 27, *Venetie* (No. 96-1577).

143. For example, Venetie's allocation of federal Indian Health Service capital for 1992 totaled \$445,000. See *id.* at 28 n.24.

144. *Id.*

145. 43 U.S.C. § 1601(c) (1994). This section provides that "no provision of the chapter shall . . . relieve, replace or diminish any obligation of the United States or of the State of Alaska to protect and promote the rights or welfare of Natives." *Id.*

146. 43 U.S.C. §§ 1606-1607, 1611 (1994). These sections require stock, voting rights and land to be held by Natives. *Id.*

147. *Id.*

148. *Alaska v. Native Village of Venetie Tribal Gov't*, 118 S. Ct. 948, 956 (1998).

149. *Alaska ex rel. Yukon Flats School Dist. v. Native Village of Venetie Tribal Gov't*, 101 F.3d 1286, 1297 (1996).

150. See, e.g., 18 U.S.C. § 1162 (1994) (granting certain states extensive criminal jurisdiction over Indian country).

151. See Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 450b(e) (1994); Indian Health Care Improvement Act, 25 U.S.C. § 1603(c), (d) (1994); Tribally-Controlled Community College Assistance Act, 25 U.S.C. § 1801(2) (1994); Indian Child Welfare Act, 25 U.S.C. § 1903(3), (8) (1994).

with the Natives, thus satisfying the federal superintendence requirement for a dependent Indian community.

B. Assimilation

Alternatively, there is a glaring likelihood that Congress intended all along for ANCSA to have a disabling effect on Indian country and tribal sovereignty. The government arguably often has developed innovative ways to take land and rights from the Indians. While treaties were executed throughout the eighteenth and early nineteenth centuries, many were entered into by force or fraud.¹⁵² Similarly, twentieth-century U.S. statutory law has often revealed itself as a wolf in sheep's clothing.¹⁵³ ANCSA was touted by its creators as pro-Indian legislation,¹⁵⁴ yet appears to have had the opposite effect on the Venetie tribe. Over the years, the government and the Indians have notoriously had different views on what is best for the Indians. ANCSA is another example of Congress's attempt to assimilate a group of people many of whom may not want to be assimilated into non-Indian society.¹⁵⁵

C. Canons of Construction

Because congressional pronouncements in the area of Indian law have traditionally been broad and often contradictory,¹⁵⁶ a number of Supreme Court decisions have announced fundamental canons for construing these acts.¹⁵⁷ Paramount to any analysis is the principle that the intent of Congress to extinguish Indian country must be reflected by language that is clear and plain.¹⁵⁸ As a result, any Indian right that is not expressly extinguished by a treaty or federal statute is reserved to Indian tribes.¹⁵⁹ In

152. See Nell Jessup Newton, *Compensation, Reparations and Restitution: Indian Property Claims in the United States*, 28 GA. L. REV. 453, 459 (1994) (comparing the fraud and coercion used in Indian treaty execution with modern statutory law); see also *supra* note 117 and accompanying text.

153. See, e.g., Indian Removal Act of 1830, ch. 148, 4 Stat. 411 (authorizing the President to negotiate with tribes for their removal from the east); The General Allotment (Dawes) Act of 1887, ch. 119, 24 Stat. 388 (codified as amended at 25 U.S.C. §§ 331-358 (1994)) (providing parcels of land to individual Indians in an attempt to break up tribes and assimilate the Indians into white culture).

154. See Kathryn A. Black, et. al., *When World's Collide: Alaska Native Corporations and the Bankruptcy Code*, 6 ALASKA L. REV. 73, 77-78 (1989); Donald Craig Mitchell, *Alaska v. Native Village of Venetie: Statutory Construction or Judicial Usurpation? Why History Counts*, 14 ALASKA L. REV. 353, 440 (1997).

155. Beginning with the General Allotment Act of 1887, many Indians have been reluctant to accept the government's attempts to assimilate the Indians into white culture. This is evidenced by the numerous tribes who are maintaining their tribal culture into the twenty-first century. See *supra* note 39.

156. See Philip P. Frickey, *Congressional Intent, Practical Reasoning and the Dynamic Nature of Federal Indian Law*, 78 CAL. L. REV. 1137, 1138 (1990) (discussing the congressional inconsistencies with respect to Indian law).

157. *Id.* at 1141.

158. *United States v. Santa Fe Pac. R.R.*, 314 U.S. 339, 354 (1941).

159. *United States v. Wheeler*, 435 U.S. 313, 323 (1978).

addition, any ambiguities in statutes and treaties are to be interpreted in favor of Indian tribes.¹⁶⁰

There is no clear language in the ANCSA legislation of Congress's intent to extinguish Indian country. Since such clear and plain language is required, if Congress had intended ANCSA to extinguish Indian country in Alaska it would have expressly done so. Absent such language, Alaska Natives must retain their inherent tribal rights and governmental autonomy.

While there is no express language in ANCSA extinguishing Indian country, there *is* express language regarding the obligations of both the federal government and the state of Alaska.¹⁶¹ ANCSA explicitly did not "relieve, replace or diminish any obligation of the United States or of the state of Alaska to protect and promote the rights or welfare of Natives."¹⁶² Therefore, ANCSA contains a provision specifically pointed toward maintaining the federal protection of Native rights, one of which is the right of the Natives to retain their tribal lands.

In general, courts can either rely on canons of construction to determine cases or reject them by claiming that legislative intent is unambiguous.¹⁶³ However, the Court in this case did not even mention these canons;¹⁶⁴ instead the Court ignored its own precedent in this decision.¹⁶⁵ If ANCSA is unambiguous, it must contain clear and plain language expressing intent to extinguish Indian country, and it contains no such language. Alternatively, if ANCSA is ambiguous, it should be interpreted in favor of the Venetie tribe. Such an interpretation would have the Venetie tribe enjoying their sovereign powers through the implementation of their Business Activities Tax, within Indian country. Either way, it is evident that in light of these canons of construction the Venetie Tribal land should maintain its Indian country status.

160. See, e.g., *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 247-48 (1985) (stating that the canons of construction applicable in Indian law are rooted in the trust relationship between the United States and the Indians and that it is well established that treaties should be construed liberally in favor of the Indians).

161. See 43 U.S.C. § 1601(c) (1994).

162. *Id.*

163. *DeCoteau v. District County Court*, 420 U.S. 425, 447 (1975).

164. See *State ex rel. Yukon Flats School Dist. v. Native Village of Venetie Tribal Gov't*, No. F87-0051 CV, 1995 WL 462232 (D. Alaska Aug. 2, 1995); see also Mizner, *supra* note 45. Mizner contends that these canons do not apply to ANCSA, observing that most of the major recent Supreme Court cases involving statutory analysis of Indian law can only be read consistently if the canon is interpreted to apply only when congress acted in its role as tribal trustee. *Id.* at 864. This is because the canon arises from the trust relationship as embodied in the conception that the federal government holds lands on behalf of the tribes and must manage these lands for the tribe's benefit. *Id.* Mizner compares the Court's application of the canons in *County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251 (1992), and *Montana v. Blackfeet Tribe*, 471 U.S. 759 (1985), with its application in *Andrus v. Glover Construction Co.*, 446 U.S. 608 (1980). *Id.* at 865-67.

165. See *Oneida*, 470 U.S. at 247-48; *United States v. Wheeler*, 435 U.S. 313, 323 (1978); *DeCoteau*, 420 U.S. at 447; *United States v. Santa Fe Pac. R.R.*, 314 U.S. 339, 354 (1941).

D. Implications of the Decision

The Supreme Court's holding in *Venetie* was persuaded in part by perceived, yet unfounded, implications of a finding of Indian country.¹⁶⁶ Fear that such a ruling would potentially and seriously disrupt the enforcement of state law throughout Alaska plagued the decision.¹⁶⁷ The possibility that the state of Alaska would be required to compete with potentially hundreds of independent entities for governmental authority within the State also loomed large.¹⁶⁸ More specifically, the Court was concerned that Native tribes across the United States would begin excessive taxation of non-tribal members based on the Tribes' status as dependent Indian communities. In reality, the warnings and predictions of legal and cultural chaos expressed by the state of Alaska and other states were misleading and highly exaggerated.¹⁶⁹

In fact, contrary to the argument of the state of Alaska, the Ninth Circuit *Venetie* decision was very narrow.¹⁷⁰ It did not hold, or even imply, that Indian country existed in all Native Villages in Alaska.¹⁷¹ Nor did it hold that all ANCSA village corporation lands are Indian country and subject to tribal jurisdiction.¹⁷² The Ninth Circuit established a six-prong test¹⁷³ to be satisfied in order for a community to constitute Indian country.¹⁷⁴ The court's decision emphasized that all six elements must be satisfied by any Native community in Alaska seeking to show that it occupies Indian country.¹⁷⁵ The *Venetie* satisfied the sixth prong¹⁷⁶ by demonstrating that the land in question was created pursuant to ANCSA.¹⁷⁷

166. The possibility of a decision in favor of Indian country raised fears of unlimited tribal authority which would require the state to compete with tribes for governmental authority within Alaska. See Joseph D. Matal, *A Revisionist History of Indian Country*, 14 ALASKA L. REV. 283, 348 (1997).

167. See generally *id.* (arguing that section 1151 was meant to define only the scope of federal laws that apply to Indian country and contending that there is no Indian country in post-ANCSA Alaska).

168. *Id.* at 348 (discussing the potential of the Ninth Circuit's decision in *Venetie* ruling to disrupt the enforcement of state law throughout Alaska).

169. Ward Ford, *supra* note 48, at 467-68 (refuting the concerns of the petitioner and amici curiae that the *Venetie* decision could enlarge the scope of tribal authority and threaten the state's ability to enforce state laws).

170. *Id.* at 468.

171. *Id.*

172. *Id.*

173. See *supra* text accompanying note 78.

174. *Alaska ex rel. Yukon Flats School Dist. v. Native Village of Venetie Tribal Gov't*, 101 F.3d 1286, 1292 (9th Cir. 1996), *rev'd*, *Alaska v. Native Village of Venetie Tribal Gov't*, 118 S. Ct. 948 (1998).

175. *Venetie*, 101 F.3d at 1300-02.

176. The sixth prong is "the extent to which the area was set aside for the use, occupancy, and protection of dependent Indian peoples." *Id.* at 1292.

177. *Id.* at 1301-02. A close reading of the Ninth Circuit's decision in *Venetie* indicates that it only discusses the status of Native Village lands. It is questionable whether the six-prong test is also applicable to regional corporation lands that form a part of a Native community in Alaska. See *id.* at 1302.

Although the Venetie tribe also satisfied the other five prongs of the test, there is no basis for the belief that every Indian community would satisfy all six prongs. Thus, there is no credible evidence to support arguments about the ominous impact of the *Venetie* decision and assertions of legal chaos.

1. The Venetie View

On May 6, 1998, the Alaska Inter-Tribal Council and the Rural Alaska Community Action Program organized a rally and subsequent conference in response to the *Venetie* decision three months before.¹⁷⁸ Tribal leaders organized the conference in order to develop a plan to reinvigorate and expand tribal authority in Alaska.¹⁷⁹ Over 3,000 Alaska Natives marched through the streets of Anchorage in protest of the governmental assault on Native rights.¹⁸⁰ Some speakers at the rally criticized the current legislature, urging Natives to register to vote and remove hostile legislators from office.¹⁸¹

While the rally showed a general feeling of unrest among Alaska Natives, many do not expect much to change in the wake of the *Venetie* decision. Some tribal members defiantly contend that they still have their land and sovereignty regardless of the interpretation of the Supreme Court.¹⁸² Alaska tribes seem to be turning their attention to defining their authority over internal tribal matters¹⁸³ in an attempt to at least maintain sovereignty over their own people. Undoubtedly, Alaska Natives will be taking their cause to Congress in an attempt to realize and emphasize their sovereign rights,¹⁸⁴ and lawyers predict the necessity of further lawsuits to clarify the limits of these sovereign powers.¹⁸⁵

The *Venetie* decision seems to be seen by the Alaska Natives as a minor set back. They have not lost their continuing battle to maintain their rights, because they will absolutely not give up what is rightfully theirs; their land, their sovereignty, their way of life.

178. Don Hunter, *In the Wake of Venetie Tribes Gather to Regroup, Re-Energize*, ANCHORAGE DAILY NEWS, May 6, 1998, at A1.

179. *Id.*

180. Tom Kizzia, et al., *4,000 Rally for Rights of Natives, March Sets Downtown to Ringing*, ANCHORAGE DAILY NEWS, May 8, 1998, at A1.

181. *Id.*

182. Tim Bristol, *Supreme Court Rejects Alaska Tribe's Indian Country Claim*, NATIVE AMERICAS, Mar. 31, 1998, available in 1998 WL 18039502.

183. Tom Kizzia, *Town Sites Keep Alive Native Hopes*, ANCHORAGE DAILY NEWS, Mar. 22, 1998, at B1.

184. Tina Kelley, *Courts vs. Native Alaskans: The "Last Indian War,"* CHRISTIAN SCI. MONITOR, Mar. 13, 1998, at 14.

185. Liz Ruskin, *Venetie Is Only the Start, Self-Governance Is Still Main Goal*, ANCHORAGE DAILY NEWS, Feb 27, 1998, at A1.

2. One Outsider's View

The implications of the Supreme Court's decision on the Venetie Indian tribe and Native Americans as a whole are potentially devastating. The reverence the Native Americans hold for the sovereignty of their tribal governments is tremendous.¹⁸⁶ This sovereignty has been taken away from the Venetie tribe.

American Indian tribes and tribal governments existed long before the framers of the Constitution.¹⁸⁷ They have ruled themselves and their land for hundreds of years.¹⁸⁸ After hundreds of years of swinging back and forth in the realm of Indian rights,¹⁸⁹ the pendulum once again swings toward oppression with the ultimate goal of assimilation. The United States has attempted to steal the land, leadership and way of life from the Native Americans.

IV. CONCLUSION

A dependent Indian community exists when land has been set aside by the federal government and is under federal superintendence.¹⁹⁰ Through ANCSA, Congress specifically set aside land for the Venetie

186. Ward Ford, *supra* note 48, at 468-69.

187. See *supra* note 1 and accompanying text.

188. North America was inhabited by over four hundred independent Indian nations when it was "discovered" by Columbus in 1492. PEVAR, *supra* note 36, at 2. Each nation had its own language, government and culture, and controlled its own territory. *Id.*

189. Since the "discovery" of the Americas in the late-fifteenth century, our forefather's treatment of the Indians has fluctuated depending on the political mood of the day. PEVAR, *supra* note 36, at 2-9. From 1492 to 1787, treaties and agreements were made amicably between the settlers and tribes. *Id.* at 2-3. Following the Revolutionary War, Congress began enacting laws which affected the Indians, such as forbidding settlers from forcibly taking Indian land. *Id.* at 3-4. It was not long before the government began overlooking such laws however, and eventually federal Indian policy changed to the Indian's detriment. *Id.* In 1828, Andrew Jackson became President and Congress passed the Indian Removal Act, which forced the Indians westward. *Id.* at 4. From the latter half of the nineteenth century, into the early twentieth century the Indians were forced to assimilate into white society through the passage of the General Allotment Act. *Id.* at 5. In the 1930's, federal Indian policy changed for the better when Franklin D. Roosevelt took office as President and Congress passed the Indian Reorganization Act. *Id.* at 6. Among other provisions, this Act prohibited further allotment of tribal land to individual Indians and authorized the Secretary of the Interior to add land to existing reservations and create new reservations for landless tribes. *Id.* Between 1935 and 1953 Indian landholdings increased by over two million acres and federal funds were allocated to programs intended to enhance the Indians' quality of life. *Id.* at 7. The economic well-being of the Indians began to decline again during the 1950's when Congress abandoned the goals of the Indian Reorganization Act and adopted a policy of "termination," terminating federal benefits and support services and forcing dissolution of a number of Indian reservations. *Id.* In 1968, Indian policy began another upward swing with Congress repudiating the termination policies of the 1950s thereby promoting tribal self government. *Id.* at 8-9.

190. See, e.g., *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 511 (1991) (holding that the question of whether land comprises Indian country depends on whether the area was validly set apart for the use of Indians, under the superintendence of the government); *United States v. McGowan*, 302 U.S. 535, 539 (1938).

tribe, in the form of a corporation.¹⁹¹ Pursuant to ANCSA, the tribe chose to convert their corporation back to tribal land and maintain their status as a dependent Indian community. The federal government continued to provide financial assistance and health programs, thus meeting the federal superintendence requirement necessary for the legal existence of a dependent Indian community.

The designation of an area as Indian country is extremely important to Native Americans. It allows them to maintain their inherent sovereignty, including the rights of self-government and self-determination. In Indian country, for example, a tribal government has the power to enact and impose taxes; to adopt and enforce internal tribal laws; to issue marriage licenses; regulate land use; adjudicate disputes and minor criminal offenses; and regulate affairs of non-Natives on tribal land.¹⁹² Through its decision in *Alaska v. Native Village of Venetie Tribal Government*¹⁹³ the Supreme Court moved toward divesting the entire Native American community of its inherent right of sovereignty. The Court's decision was misguided in its process and is unjust in its effect.

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191. 43 U.S.C. §§ 1607 (1994 & Supp. I 1995); 43 U.S.C. § 1608 (1994); 43 U.S.C. § 1611 (1994); 43 U.S.C. § 1613 (1994 & Supp. I 1995).

192. COHEN, *supra* note 3, at 246-57.

193. 118 S. Ct. 948 (1998).

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